United States Court of Appeals

for the Second Circuit

INTERVENOR'S REPLY BRIEF

76-5039

Signed Original

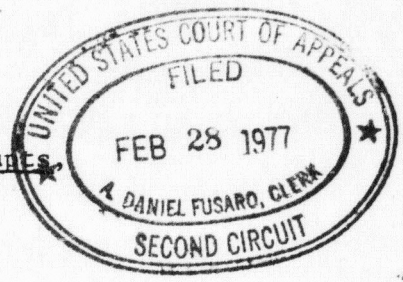
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 76-5039

In re

REA HOLDING CORPORATION
THE EXPRESS COMPANY
REA EXPRESS, INC., f/k/a
Railway Express Agency, Inc.
REXCO SUPPLY CORPORATION,

Bankrupts.



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Creditors-Appellants,

BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES,

Intervenor,

v.

C. ORVIS SOWERWINE, Trustee in Bankruptcy,

Appellee.

On Appeal From The United States District Court
For The Southern District Of New York

REPLY BRIEF OF INTERVENOR
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

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February, 1977

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REPLY BRIEF OF INTERVENOR BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS

Intervenor Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes [hereinafter, "BRAC"] respectfully submits this reply brief in response to an argument made by appellee in his brief that the Chapter X petition was not filed in good

faith under general equity principles since the petitioning creditors, in the opinion of the Trustee, "are seeking to put at risk other creditors' money to which the petitioning creditors have no claim." Appellee's Br. at 31. Intervenor BRAC respectfully submits that such an argument is based upon a false assumption of fact and an erroneous conclusion of law.

I

Employee-Creditors Of REA Express, Inc., Have A Statutory And Equitable Right To Seek To Save REA's Corporate Existance

Appellee points out in his brief that a Chapter X petition must be filed in good faith and that the term "good faith" is not limited to the four examples spelled out in Section 146 of the Bankruptcy Act. 11 U.S.C. §546. Intervenor BRAC agrees with appellee's conclusion that the term good faith includes general equitable considerations, as well as the four factors stated in Section 146, and that a petition may be rejected as having been filed in bad faith under general equity principles even though it passes muster under Section 146(1) through (4). However, BRAC disagrees with appellee's application of general principles of equity in the case at bar.

Appellee concludes that the Chapter X petition was not filed in good faith in the case at bar under general equity principles since appellants and similarly situated BRAC-REA employees are seeking to place "other people's money at risk on the remote chance that enough profits will be made to pay some money over to them." Appellee's Br. at 29. Besides being premised upon false factual assumptions, appellee's argument on this point is also based upon an erroneous interpretation of law. Contrary to appellee's

implied assumption of law, Section 126 of the Bankruptcy Act, 11 U.S.C. §526, does allow a few creditors of an estate to require that all creditors of that estate place their right to recover a certain percentage of their accounts "at risk" on the chance that a reorganization will eventually be successful, permitting a fuller recovery by all creditors. Section 146 of the Act, it is submitted, is intended to protect those unwilling creditors from facing too great a risk. Appellee's argument, consequently, while couched in terms of general principles of equity, is in reality a reargument of Section 146(3)'s conclusion that a petition will not be deemed to have been filed in good faith if "it is unreasonable to expect that a plan of reorganization can be effected . . . ."

However, the main fallacy[1/] of appellee's argument on general principles of equity is that he assumes that appellants and similarly situated BRAC-REA employees do not possess valid administration period claims, even though such employee-creditors continue to assert that their administrative claims are valid and may well total over $16 million. BRAC Memorandum of June 23, 1976, at 18 [hereinafter, "BRAC Memo. 6/23/76"]. Appellee supports his contention that such administration claims are worthless by stating that counsel for the debtor-in-possession expressed that opinion,[2/] and by

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1/ Appellee is also in error in asserting that the chances of reorganization are "remote." Since the Bankruptcy Court did not permit a hearing into that aspect of the petition under Chapter X, appellee should not be permitted to bootstrap that conclusion by relying upon untested allegations.

2/ Appellee cites Trustee's App. at 81-82 for support of that statement, but that transcript refers tc only one of four factual assumptions.

briefly giving the reason for such a legal conclusion. Appellee's Br. at 9. However, the fact remains undisputed that the Trustee has never specifically moved to reject such claims, and no judicial tribunal has ever ruled upon the merits of the employees' claims. Until the Trustee has moved to reject the BRAC-REA employees' claims and the Bankruptcy Court has considered the merits of such a contention, the Trustee has no justification, it is submitted, for alleging to this Court that the claims are worthless.

A. Employees' Administration Claims Are Valid

Appellants and other BRAC-REA employees' administration claims grew out of REA's actions in unilaterally deferring payment of vacation pay, holiday pay and 10% of wages due to its contract employees. The Trustee now contends that the estate does not owe anything to REA's employees on those employment claims because:

> [W]hen the Second Circuit upheld the rejection of the BRAC contract, ... the claims of the BRAC employees for holiday and vacation pay and the additional 10% of salary became void because there was no contract to support them, and the employees had nevertheless continued to work and accept whatever salaries were being paid by the then debtor-in-possession. Therefore the value of the waiver of such Chapter XI administration claims of the employees was zero. Appellee's Br. at 9.

Intervenor BRAC respectfully submits that such an argument is totally devoid of merit.

Shortly after REA filed its application on February 18, 1975, for an arrangement under Chapter XI of the Bankruptcy Act, 11 U.S.C. §701, et seq., REA began the practice of "deferring" certain wage payments of its contract employees. On March 24, 1975, REA, as a debtor-in-possession,

moved to reject its collective bargaining agreements with BRAC and another union, but that motion was denied by the Bankruptcy Court on May 2, 1975. REA appealed to the District Court, and by an opinion and order filed on May 19, 1975, the District Court granted REA's request to reject its collective bargaining agreements. This Court denied a stay of the District Court's order on May 27, 1975, while an appeal was being prosecuted, and on August 27, 1975, this Court affirmed the underlying principle of the District Court's ruling, but remanded the case to the lower court for further consideration and findings on whether the two collective bargaining agreements were sufficiently onerous and burdensome to warrant an authorization to the debtor-in-possession to reject them. 523 F.2d 164 (2nd Cir.), cert. denied, 423 U.S. 1017 (1975). REA, though, continued to defer payment of wages due. On May 25, 1976, the District Court on remand found that the BRAC contract was sufficiently onerous and burdensome to warrant rejection. However, REA had been adjudicated a Bankrupt by that time, and the Court did not specifically state that its decision related back to its original order of May 19, 1975, or to any earlier date. Nevertheless, the Trustee asserts in this Court that the rejection of the BRAC-REA contract invalidates employee claims from the date REA began to defer payment of wages due, albeit months before the District Court first authorized rejection of the collective bargaining agreement.

Contrary to the Trustee's assertion that the employees voluntarily worked for less wages after February 18, 1975, the plain fact is that REA had informed its employees that the reduction in salary was merely a deferment of part of their wages due, and that they would eventually be

paid the amount owed. See, Appendix 3 to BRAC Memo. 6/23/76. Consequently, appellee is on less than solid ground when it even asserts that the employees' wage scale was ever rejected. E.g., In re Greenpoint Metallic Bed Co., 113 F.2d 881, 884 (2nd Cir. 1940). Depending on what day is eventually assigned to the date that the contract was in fact rejected, if such a date is even necessary legally, the amount of the employee contract administration claims could range from $3.2 million for claims from February 18 to March 24, 1975, to $10,219,000 for claims until May 19, 1975, to $13,113,000 for claims until the adjudication of bankruptcy on November 6, 1975. BRAC Memo. 6/23/76 at 12-13; Tr. of 6/23/76 at 173-74.

However, even if the Trustee should eventually prevail on his argument that the administration claims are not supported by the express contract between BRAC and REA, it is clear that the employees would then have valid wage claims on a quantum meruit basis for the wages deferred during the administration period. As shown by the collective bargaining history detailed for the Bankruptcy Court by BRAC in its June 23, 1976, memorandum and exhibits, REA employees were receiving substandard wages during 1975 and the 1974 wage increases were intended to help alleviate that problem. Since BRAC-REA employees continued to perform work for REA during the administration period, they would be entitled to be compensated at a quantum meruit basis if there was no express contract covering their employment. E.g., Responsive Environments Corp. v. Pulaski County Special School District, 366 F.Supp. 241, 243-44 (E.D. Ark. 1973). And since the fair market value of their services was greater than their contract wages, the employees may well be entitled to

over $16 million in administration claims. See, BRAC Memo. 6/23/76 at 14-18. At the least, a judicial tribunal must pass on this claim, and not merely counsel for the debtor or Trustee.

In short, petitioners and similarly situated creditors are priority creditors who have a valid claim to most of the present value of the Bankrupt's estate. Consequently, under general considerations of equity, this class of creditors should be given a strong voice in the decision as to which course REA's bankruptcy should follow. Since the employee creditors are willing to take the "risk" that their former employer can still survive, if just given a chance, intervenor BRAC respectfully submits that the Bankruptcy Court should at least give appellants, and those creditors who wish to support them, an opportunity to show that their petition has been filed in good faith.

CONCLUSION

The decision of the Court below should be reversed and this case remanded.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have served two copies of the Reply Brief of Intervenor Brotherhood of Railway and Airline Clerks upon all parties of record to this proceeding by mailing a copy thereof by first class mail, postage prepaid, to the following:

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Dated: February 24, 1977

Paul G. Reilly, Jr.